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IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant rehearing of its order of December 5, 1960, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the County Court of Tioga County, State of New York, in the above entitled case as prayed for in the petition filed September 30, 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I. The issues presented by the within petition for certiorari are almost identical with questions 2 and 3 in *Slagle v. Ohio*, 364 U. S. 811, wherein this Court postponed consideration of the jurisdiction question to the hearing of the case on the merits.

The questions there read as follows (29 LW 3093):

2. Were contempt convictions repugnant to Fourteenth Amendment in view of state commission's failure to direct witness to answer questions after their refusal on ground of self-incrimination;

3. Is Ohio immunity statute repugnant to Fifth and Fourteenth Amendments in that it does not grant immunity from prosecution by United States and other states.

Here, the petitioner is not a resident of the state which granted the immunity but is a New Jersey resident who urged his constitutional plea before a New York grand jury.

This Court has not yet decided *Slagle* v. *Ohio* which bears No. 105 on the calendar for argument.

The petitioner may be compelled to serve a 60 day jail term even though this Court should sustain his contentions made in *Slagle* v. *Ohio*.

In all fairness, the within petition should at least be held in abeyance pending the determination of *Slagle* v. *Ohio*.

II. The failure of the Court to inform the petitioner of the extent of the profferred immunity, the absence of both hearing and a direction by the Court to the petitioner, constituted a denial of procedural due process.

After the denial of the petition herein, this Court decided *Reina* v. *United States* (29 LW 4063, *December 19, 1960*). Counsel there "argued that the witness was denied due process of law, since the district court failed to inform him of the extent of the immunity granted by the Narcotic Control Act".

"That is a good reason", Mr. Justice Frankfurter interjected, "why he should not go to jail without more, but it is not a good reason why he should refuse to answer the questions when this Court finishes with the case" (29 LW 3142).

Procedural safeguards should not be disregarded in contempt matters. *Sacher* v. *United States*, 343 U. S. 1, 24-25 (Frankfurter, *J.*, dissent).

A witness must be given a fair apprisal at a hearing of the rejection of his privilege for him to be adjudged in contempt. This applies to state and federal courts. *Quinn* v. *United States*, 349 U. S. 155, 161, 168, 170. *Here, there was no such hearing.*

No apprisal was given to the witness that his plea of privilege was rejected.

After direction by the grand jury foreman, the questions were repeated and were again answered by the non-resident witness with the statement:

> "I refuse to answer the question on the ground that I may incriminate myself."

No court direction was made directing the witness to answer.

In *Brown* v. *United States*, 359 U. S. 41, 49, Mr. Justice Stewart declared:

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses.
>
> It is the court's process which summons the witness to attend and give testimony, *and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.* (Emphasis supplied)

In *Brown* v. *United States*, and *Levine* v. *United States*, 362 U. S. 610, there were court directions to the witness. *Here there were none.*

If the contempt procedure followed herein is established as the law of the land, the day is not far off when a witness can be held in contempt for asserting his privilege before a district attorney or a police officer.

III. No opportunity to purge himself was offered to the petitioner by the Court or the Grand Jury foreman.

No hearing having been conducted before the court to ascertain whether the plea of privilege was justified, it follows that no direction to answer was made, and no opportunity given the witness to purge himself. *Hence, the Court's duty was circumvented. Hoffman* v. *United States*, 341 U. S. 479, 486.

In *Flaxer* v. *United States* 358 U. S. 147, 151, the contempt conviction was reversed because the witness was not given the opportunity to purge himself of the contempt for refusing to answer questions.

In *Reina* v. *United States*, 29 L W 4063, *decided December 19, 1960*, this Court allowed the witness to purge himself of his contempt by appearing within 60 days and answering grand jury questions. This is fair and proper.

The petitioner, Riela, was given no such opportunity to purge himself of the contempt despite his desire now to avoid a 60 day jail term by testifying.

CONCLUSION

For reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing a writ of certiorari issue to the County Court of Tioga County, State of New York.

Respectfully submitted,

LOUIS MANSDORF, ESQ.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Louis Mansdorf

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